INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	2
Date of judgment and of petition for appeal	3
Nature of case and ruling below	4
Cases believed to sustain jurisdiction	14
Federal questions specifically and necessarily decided	16
Federal questions seasonably raised	19
A single appeal is sufficient to present both cases to the Supreme Court of the United States	21
Final judgment	21

TABLE OF CASES CITED.

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231	20
Arkadelphia Mill Co. v. St. Louis, S. W. R. Co., 249 U. S. 134, 63 L. Ed. 517	15
Bluefield Waterworks and Improvement Co. v. Public Service Commission, 262 U. S. 679, 67 L. Ed. 1176	14, 15
Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107	19
Chicago, B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979	18
Crowell v. Randall, 10 Peters, 368, 9 L. Ed. 458	16
Dewey v. City of Des Moines, 173 U. S. 193, 43 L. Ed. 667	18
First National Bank of Shreveport v. Louisiana Tax Commission, 289 U. S. 60, 77 L. Ed. 1030	21
Grand Trunk Western R. Co. v. R. R. Commission, 221 U. S. 400, 55 L. Ed. 786	15
Great Northern Railway Company v. Sunburst Oil & Refining Co., 287 U. S. 358, 77 L. Ed. 360	20
Gulf Ref. Co. v. U. S., 269 U. S. 125	22
King Manufacturing Co. v. Augusta, 277 U. S. 100, 72 L. Ed. 801	15
Lake Erie and W. R. Co. v. State Publ. Utilities Comm. Ill., 249 U. S. 422, 63 L. Ed. 684	15
Lima Telephone & Telegraph Co. v. Public Utilities Commission of Ohio, 98 O. S. 110	16
Live Oak Water Users' Association v. R. R. Comm., 269 U. S. 354, 70 L. Ed. 305	15
L. & N. R. R. Co. v. Garrett, 231 U. S. 298, 58 L. Ed. 229	15
Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 74 L. Ed. 870	19
New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. Ed. 184	18

Page

Northern P. R. Co. v. Department of Public Works, 268 U. S. 39, 69 L. Ed. 836 15
Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290, 67 L. Ed. 659 .. 15
Rio Grande W. Ry. v. Stringham, 239 U. S. 44 21
Williams v. Bruffy, 90 U. S. 176, 24 L. Ed. 716 14

STATUTES AND AUTHORITIES CITED.

Act of January 31, 1928 (28 U. S. C. 861a) 2
Act of April 26, 1928 (28 U. S. C. 861b) 2
Constitution of the State of Ohio, Article XVIII, Sections 4 and 5 (Page's Complete Ohio General Code, p. 3109) 9
Constitution of the United States, Article I, Section 10 ..... 6, 7
14th Amendment, Section 1 6
Judicial Code, Section 237, as amended by the Act of February 13, 1925 (28 U. S. C. 344 and 344a) 22
General Code of Ohio, Section 499-8 11
499-9 11
499-9-(D) 12
499-9-(E) 12
499-9-(F) 12
499-9-(G) 12
499-13 11
544 4
545 4
549 4
614-46 ..... 10, 11
614-49 12
614-50 13
Rules of the Supreme Court of the United States, Rule 10, Par. 2 3
Rule 12 14
United States Code, Title 28, Section 344a 2

IN THE SUPREME COURT OF OHIO

No. 23864.

THE COLUMBUS GAS AND FUEL COMPANY,
Plaintiff in Error,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Defendant in Error.

No. 23868.

THE CITY OF COLUMBUS, OHIO,
Plaintiff in Error,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Defendant in Error.

CONSOLIDATED BY ORDER OF THIS COURT, DATED THE 25TH DAY OF APRIL, 1933.

STATEMENT OF GROUNDS OF JURISDICTION.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

I.

Statutory Provisions Sustaining Jurisdiction.

Section 861-a of Title 28, Supplement VI to the Code of Laws of the United States (approved January 31, 1928):

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

Section 861-b of Title 28, Supplement VI to the Code of Laws of the United States (approved January 31, 1928; amended April 26, 1928):

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

Section 344-a of Title 28, Code of Laws of the United States:

> "(a) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United

States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

II.

Date of Judgment and of Petition for Appeal.

(NOTE:) Paragraph 2 of Rule 10 of the Supreme Court of the United States provides that the Clerk of the Court from which an appeal to the Supreme Court of the United States may be allowed shall make and submit to that Court a certified copy of the material parts of the record. Rule 12 of the Supreme Court of the United States, as amended, now requires the presentation to the Judge to whom the application for allowance of the appeal is made, of a statement in typewritten form of the grounds of jurisdiction.

It is assumed that where the Application for Appeal is made to the Chief Justice of the Court possessing the record, the transcript of the record need not be made up until or unless the appeal is allowed. The appropriate pages of the record are therefore left blank, and Appellant undertakes to supply the appropriate pages for insertion therein prior to the printing of the record for the use of the Supreme Court.

The decision of the Supreme Court of Ohio was announced by written opinion dated June 21, 1933.

The judgment of the court was entered March 30, 1934. The mandates from said court to The Public Utilities Commission of Ohio were issued on the 30th day of March, 1934.

The Petition for Appeal was filed in the office of the Clerk of the Supreme Court of Ohio, and presented to the Chief Justice of said court on the 5th day of April, 1934.

III.

Nature of Case and Ruling Below.

The case in the Supreme Court of Ohio was a proceeding in error under Sections 544, 545 and 549 of the General Code of Ohio, from a final order made by The Public Utilities Commission of Ohio fixing a rate to be charged by The Columbus Gas and Fuel Company for natural gas for lighting and fuel purposes in the City of Columbus, Ohio, including the price to be paid by The Columbus Gas and Fuel Company to The Ohio Fuel Gas Company for natural gas at the gateways of the City of Columbus, Ohio; and the price to be paid by The Ohio Fuel Gas Company to United Fuel Gas Company for gas at the Ohio-West Virginia state line. The Supreme Court of Ohio is the highest and the only court in the State in which a decision in the case could be had.

The order of The Public Utilities Commission of Ohio was made in a proceeding in which The Columbus Gas and Fuel Company had complained of and appealed from an ordinance of the City of Columbus, Ohio, fixing the rate to be charged for natural gas in said city at 48¢ per thousand cubic feet, with a minimum charge of 75¢ per customer per month, and an additional charge of 5¢ for each one thousand cubic feet if the monthly bills were not paid within a prescribed time. The order of the Commission found said ordinance rate to be unreasonable and unlawful and substituted therefor the rate of 55¢ per thousand cubic feet, with a minimum charge of 75¢ per customer per month, and an additional charge of 5¢ for each one thousand cubic feet if the monthly bills were not paid within a prescribed time. By said order The Public Utilities Commission of Ohio found that the price of 39.022¢ per thousand cubic feet was a reasonable price to be paid by The

Columbus Gas and Fuel Company to The Ohio Fuel Gas Company, an affiliated company, at the gateways of the City of Columbus, and substituted said price for the price of 45¢ per thousand cubic feet fixed by a contract between said The Columbus Gas and Fuel Company and The Ohio Fuel Gas Company. The order of the Commission also found that 22.04¢ per thousand cubic feet was a reasonable price to be paid by The Ohio Fuel Gas Company to United Fuel Gas Company, also an affiliated company, for natural gas at the Ohio-West Virginia state line, and substituted said price for the price of 26½¢ fixed by a contract between said The Ohio Fuel Gas Company and United Fuel Gas Company.

Subsequent to the order of The Public Utilities Commission fixing said rates and prices, the Appellant filed an Application for Rehearing by said Commission, on the ground that the rates and prices fixed were unlawful, unreasonable and repugnant to the Constitution of the United States for reasons therein specifically set out, including:

(a) That said order in respect of the rates and prices fixed therein, the return allowed, the valuation of the property upon which the return was allowed, and the operating expenses provided for, including allowances for depreciation, depletion and amortization, was contrary to the evidence, was not supported by the evidence, and was manifestly against the weight of the evidence;

(b) That said order deprived said The Columbus Gas and Fuel Company, The Ohio Fuel Gas Company and United Fuel Gas Company of their property without due process of law and denied to said companies the equal protection of the law, contrary to the provisions of Section One of Article Fourteen of the Articles in Addition to and Amendment of the Constitution of the United States; and

(c) That said order impaired the obligations of a contract between The Columbus Gas and Fuel Company and The Ohio Fuel Gas Company, and a contract between The Ohio Fuel Gas Company and United Fuel Gas Company in violation of Section Ten of Article One of the Constitution of the United States. Such Application for Rehearing was required by the laws of Ohio as a condition to a review of the order of the Commission by the Supreme Court of Ohio. Said Application for Rehearing was denied.

Upon such denial Appellant filed in the Supreme Court of Ohio a petition in error claiming that said order of said Commission, for reasons also therein specifically set out, was unlawful, unreasonable and repugnant to the Constitution of the United States for the same reasons and upon the same grounds set out in the Application for Rehearing before said Commission. The invalidity of said order on said grounds was presented and submitted to the Supreme Court of Ohio in both written and oral argument.

Following said order of said The Public Utilities Commission of Ohio, and the denial of an application for rehearing, the City of Columbus, Ohio, intervened in the proceedings in error filed in the Supreme Court of Ohio by Appellant, and also filed in the Supreme Court of Ohio a separate petition in error claiming that the order of the Commission was unreasonable and unlawful. The proceedings in error filed by Appellant and the proceedings in error filed by the City of Columbus, Ohio, being numbered respectively No. 23864 and No. 23868 on the docket of said Supreme Court of Ohio, were by order of said Court, dated the 25th day of April 1933, consolidated, and said cases were assigned, heard and decided by the Supreme Court of Ohio together in a single opinion and upon the single

transcript filed in said Court by The Public Utilities Commission of Ohio.

The judgment of the Supreme Court of Ohio was in favor of the validity of said order of The Public Utilities Commission of Ohio so far as the claims of Appellant that the same was repugnant to the Constitution of the United States were concerned. Said Court not only held that the 55 cent distribution rate fixed by the Commission and substituted for the rate fixed by the Council of the City of Columbus, which 55 cent rate was based on a 39.22 cent gateway price, and a 22.04 cent price at the Ohio-West Virginia state line, was not repugnant to the Constitution of the United States, but sustained the validity of the ordinance passed by the City of Columbus fixing a 48 cent distribution rate which required a 31.7 cent gateway price and a 17.79 cent price at the Ohio-West Virginia state line, and held that said ordinance was not repugnant to the Constitution of the United States, on any of the grounds claimed by appellant.

The constitutional questions presented to the Supreme Court of Ohio by the petition in error, to wit, the validity of the 55 cent distribution rate, the 39.022 cent gate rate price, and the 22.04 cent State-line price, necessarily included the claim that the ordinance of the City of Columbus fixing the 48 cent distribution rate, and requiring the 31.7 cent gateway price, and a 17.79 cent State line price were repugnant to the Constitution of the United States because of a denial of due process and equal protection of the law under the Fourteenth Amendment, and an impairment of the obligations of contracts under Section Ten of Article One of the Constitution of the United States. The court specifically held that the 48 cent distribution rate fixed and required by the Ordinance of the City of Columbus was "neither unreasonable, unlawful nor confiscatory"; that

the gateway price should not be more than the 31.7 cents found by the Minority member of the Commission; and that the 17.79 cent price for gas from West Virginia, fixed by the Minority Commissioner was "not unreasonable, unlawful nor confiscatory. Nevertheless appellant in its Application for Rehearing, filed in the Supreme Court of Ohio, made the specific claim, for reasons therein specifically set out, that such rates and prices were repugnant to the Constitution of the United States upon said grounds. The ordinance fixing the 48 cent distribution rate, and requiring the 31.7 cent gateway price, and the 17.79 cent state line price, not having been held valid at any earlier point in the proceeding before the Commission or the Court, this was the first opportunity to directly present that specific claim.

By the court's decision it was also held for the first time that the Constitution, statutes and/or law of Ohio do not permit the inclusion in rates fixed thereunder of any allowances for:

Depletion of wasting assets,
Amortization of property,
Rentals paid for gas leases.

That in fixing rates or prices for natural gas the transmission property and expenses should be allocated on a demand-mileage basis; and

That the value of property owned and used entirely in the State of West Virginia by a corporation which so far as this case is concerned, does no business in the State of Ohio should be fixed by applying thereto the laws of Ohio instead of the laws of West Virginia.

This being the first time the Commission or the court in this or any other proceeding had so held in respect of said matters, appellant in its Application for Rehearing, filed with and denied by the court, made the specific claim that

said Constitution, statutes and/or law so interpreted, were repugnant to the Constitution of the United States on the ground that they deprived the owners of the property which the Court held constituted a single operating unit of their property without due process of law and denied to them the equal protection of the law, contrary to the provisions of Section One of Article Fourteen of the Articles in Addition to and Amendment of the Constitution of the United States, and impaired the obligations of contracts contrary to Section Ten of Article One of the Constitution of the United States.

The provisions of the Constitution of Ohio which the Supreme Court of Ohio holds require the allocation of transmission property and expenses on a demand mileage basis, but permit the allocation of production property and expense and general property and expense on a sales basis, provide as follows:

Sections 4 and 5 of Article XVIII of the Constitution of Ohio provide (Page's Complete Ohio General Code, p. 3109):

> "SECTION 4. Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."
>
> "SECTION 5. Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance shall take effect until after thirty days from its passage.

> If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of Section 8 of this article as to the submission of the question of choosing a charter commission."

The pertinent provisions of the Statutes of Ohio which the Supreme Court of Ohio holds to be valid and not repugnant to the Constitution of the United States, and which said court holds require the rates and prices found by said court, and in particular forbid any allowance in rates fixed thereunder of any return upon the value of gas leaseholds not yet drilled but owned and used as the source of supply of natural gas; any allowance for depletion of wasting assets; any allowance for amortization of property; and any allowance for rentals actually paid on gas leaseholds not yet drilled but owned and used as the source of supply of natural gas, are as follows:

Section 614-46 of the General Code of Ohio provides that if the Commission, after a hearing upon a complaint filed by a public utility, shall be of the opinion that the rate or price fixed by an ordinance of a municipality

> "* * * is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility, actually used and useful for the convenience of the public," and
> "* * * to the necessity of making reservations from the income for surplus, depreciation and contingencies, and such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate, price, charge, toll or rental to be charged, demanded, exacted or collected by such pub-

lic utility, during the period so fixed by ordinance which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance, is just and reasonable, and ratify and confirm the same."

Said Section 614-46 also provides:

"No such rate, price, charge, toll or rental so determined by the commission shall become effective or valid until after the commission shall have ascertained and determined the valuation upon which such price, charge, toll or rental is based as provided in this act."

Section 499-13 of the General Code of Ohio contains the following provision:

"* * * Whenever the authority is conferred or the obligation imposed by law upon the commission to ascertain the value of any public utility or railroad, such valuation under such authority or obligation shall be made in accordance with the provisions of this act."

Section 499-8 of the General Code of Ohio contains the following provision:

"The Commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law may investigate and ascertain the value of the property of any public utility or railroad in this state, used or useful for the service and convenience of the public."

Section 499-9 of the General Code of Ohio contains the following provisions:

"* * * In ascertaining the value of the various kinds and classes of property of each public utility

or railroad, the commission shall have authority to ascertain and report in such detail as it may deem necessary as to each piece of property owned or used by such public utility or railroad to show separately the following facts:

* * * * * * *

(D) The cost of new production as of a date certain, of all physical property other than land, owned and used by such public utility or railroad, showing the values of the separate items comprising such property, together with the unit basis of such valuation.

(E) Depreciation, if any, from the new reproductive cost as of a date certain, for existing mechanical deterioration, for age, for obsolescence, for lack of utility or for any other cause, the percentage and amount of each class of depreciation, if any, to be specifically set forth in detail.

(F) The net value as of a date certain, of all physical property other than land owned by such utility or railroad, to be derived by deducting the sum of the amounts of depreciation from the sum of the new reproductive costs.

(G) If there shall be any additional value given to the value of the property of a public utility or railroad due to the possession of a franchise to perform a public service, or for good will or for financing, such additional value shall be separately and specifically set forth, together with the basis for the computation or estimate of such additional value."

Section 614-49 of the General Code of Ohio provides as follows:

"Every public utility shall carry a proper and adequate depreciation or deferred maintenance account, whenever the commission after investigation shall determine that a depreciation account can be reasonably required. The commission shall ascertain, determine

and prescribe what are proper and adequate charges for depreciation of the several classes of property for each public utility. The charge for depreciation shall be such as will provide the amount required over and above the cost and expense of maintenance to keep the property of the public utility in a state of efficiency corresponding to the progress of the art or industry. The commission may prescribe such changes in such charges for depreciation from time to time as it may find necessary."

Section 614-50 of the General Code of Ohio provides as follows:

"The moneys for depreciation charges thus provided for shall be set aside out of the earnings and carried as a depreciation fund. The moneys in such fund may be expended in new construction, extensions or additions to the property of the public utility, or invested, and if invested, the income from the investment shall also be carried in the depreciation fund. Such fund and the proceeds thereof, may be used for the purpose of renewing, restoring, replacing or substituting depreciated property in order to keep the plant in a state of efficiency. Such fund and the proceeds or income therefrom shall be used for no purpose other than as provided in this section, except upon the approval of the commission."

The decision and opinion of the court shows on its face that the court did not read the record and exhibits. By its Application for Rehearing, filed with and denied by the court, being the first opportunity offered, appellant claimed that such failure to examine the record and exhibits resulted in a denial to the owners of the property involved of due process of law, contrary to the provisions of said Section One of Article Fourteen of the Constitution of the United States.

IV.

Cases Believed to Sustain Jurisdiction.

The following decisions are believed to sustain jurisdiction of this Appeal:

(NOTE.) Rule 12 requires only that cases be cited. However as this statement is now submitted first to the Chief Justice of the Supreme Court of Ohio, we have as a convenience to that Court quoted from the cases.

The Order of the Commission and the Ordinance of the City of Columbus are "statutes" of the State.

In the case of *Williams* v. *Bruffy*, 90 U. S. 176, 24 L. Ed. 716, the Court in discussing the right of appeal from a state court, said:

> "Any enactment from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the Legislature. There may be many Acts authorized by the Constitution of a state, or by the convention that framed it, which have not been submitted to the consideration of its Legislature, yet have all the efficacy of laws."

In the case of *Bluefield Waterworks and Improvement Co.* v. *Public Service Commission*, 262 U. S. 683, 67 L. Ed. 1176, the Court said:

> "The prescribing of rates is a legislative act. The Commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by legislature. If, as alleged, the prescribed rates are confiscatory the order is void. Plaintiff in error is entitled to bring the case

here on writ of error and to have that question decided by this court. The motion to dismiss will be denied."

In the case of *King Manufacturing Co.* v. *Augusta,* 277 U. S. 100, 72 L. Ed. 801, the Court said:

"Further applying the ruling in *Williams* v. *Bruffy,* this court repeatedly has held that an order of a state commission made in the exercise of delegated legislative authority, is a statute of the state in the sense of the jurisdictional provision. Excerpts from some of the cases—all brought here from the state courts on writs of error—will suffice to show the course of decision."

The Court then cites and quotes from the following cases:

Lake Erie and W. R. Co. v. *State Pub. Utilities Comm.* (Ill.) 249 U. S. 422, 63 L. Ed. 684.

Bluefield Waterworks and Improv. Co. v. *Public Serv. Comm.,* 262 U. S. 679, 67 L. Ed. 1176.

Northern P. R. Co. v. *Department of Public Works,* 268 U. S. 39, 69 L. Ed. 836.

Live Oak Water Users' Association v. *R. R. Comm.,* 269 U. S. 354, 70 L. Ed. 305.

Grand Trunk Western R. Co. v. *R. R. Commission,* 221 U. S. 400, 55 L. Ed. 786.

L. & N. R. R. Co. v. *Garrett,* 231 U. S. 298, 58 L. Ed. 229.

Arkadelphia Mill. Co. v. *St. Louis S. W. R. Co.,* 249 U. S. 134, 63 L. Ed. 517.

Oklahoma Natural Gas Co. v. *Russell,* 261 U. S. 290, 67 L. Ed. 659.

The Court further said:

"In no case has the phrase 'a statute of any state' in the jurisdictional provision been construed otherwise than as shown in the foregoing review. With its

use elsewhere—especially in connections indicative of its use in a different sense—we are not now concerned."

In the case of *Lima Telephone & Telegraph Co.* v. *Public Utilities Commission of Ohio*, 98 O. S. 110, the Supreme Court of Ohio, in discussing an order of The Public Utilities Commission of Ohio, fixing rates, said:

> "The making of rates to be paid by a public utility is a legislative function to be exercised by the Legislature or subordinate body to which the power has been delegated * * *."

Federal Questions Specifically and Necessarily Decided.

In the early case of *Crowell* v. *Randall*, 10 Peters, 368, 9 L. Ed. 458, the Court, in discussing the section providing for review of the decision of a state court said:

> "In interpretation of this section of the Act of 1789, it has been uniformly held that to give this court appellate jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and second, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question might have occurred, or such a decision might have been made in the court below. It must be demonstrable that they did exist and were made. The principal, perhaps the only important difficulty which has ever been felt by the court, has been in ascerting in particular cases whether these matters (the question and decision) were apparent on the record. And here the doctrine of the court has been that it is not indispensable that it should appear on the record, *in totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it is clear from the facts stated

by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment."

The opinion by Mr. Justice Story then contains a review of the decisions of the Supreme Court during the preceding twenty-five years on this point and concludes with the following:

"These are all the cases, it is believed, in which the construction of the twenty-fifth section of the Judiciary Act has been made matter of controversy; and they extend over a period of more than twenty-five years. They exhibit an uniformity of interptation of that section which has never been broken in upon. They establish, so far as a course of decision can establish, the propositions already stated in the early part of this opinion. The period seems now to have arrived in which the court should, upon a full review of all the cases with a view to close, if possible, all future controversy on the point, reaffirm the interpretation which they have constantly maintained. It is, that to bring a case within the twenty-fifth section of the Judiciary Act, it must appear upon the face of the record: 1st. That some one of the questions stated in that section did arise in the State Court. 2d. That the question was decided by the State Court, as required in the same section. 3rd. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms *ipsissimis verbis;* but that it is sufficient if it appears by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment. 4th. That it is not sufficient to show that a question might have arisen or been applicable to the case, unless it is further shown, on the record, that it did arise, and was applied by the State Court to the case."

In the case of *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 73 L. Ed. 184, the Court said:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity, and the ground therefor, be brought to the attention of the State court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim that is enough."

In the case of *Dewey* v. *City of Des Moines*, 173 U. S. 193, 43 L. Ed. 667, the Court said:

> "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the State court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law."

In the case of *Chicago B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. Ed. 979, the Court said:

> "It is true that the Supreme Court of Illinois did not in its opinion expressly refer to the Constitution of the United States. But that circumstance is not conclu-

sive against the jurisdiction of this court to re-examine the final judgment of the state court. The judgment of affirmance necessarily denied the Federal rights thus specially set up by the defendant; for that judgment could not have been rendered without deciding adversely to such claims of right.

Federal Questions Seasonably Raised.

A claim that a state statute is repugnant to the Constitution of the United States is seasonably made by Application for Rehearing in cases where no earlier opportunity is presented.

In the case of *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 74 L. Ed. 870, the Court said:

> "It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. Citizens Nat. Bank v. Durr, 257 U. S. 99, 106, 66 L. Ed. 149, 152, 42 Sup. Ct. Rep. 15. But here the company, at the first opportunity, invoked the protection of the Federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States."

In the case of *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 74 L. Ed. 1107, the Court said:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that, in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the 14th Amendment. The additional federal claim thus made was

timely, since it was raised at the first opportunity. Missouri ex rel, Missouri Inc. Co. v. Gehner, 281 U. S. 313, ante, 870, 50 Sup. Ct. Rep. 326."

In the case of *American Surety Co.* v. *Baldwin,* 287 U. S. 156, 164; 77 L. Ed. 231, the Court in refusing to review the federal question raised for the first time in a petition for rehearing said:

> "This is not a case where, as in Saunders v. Shaw, 244 U. S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Compare Ohio ex rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 79, 74 L. Ed. 710, 715, 66 A. L. R. 1460, 50 S. Ct. 228. Nor is the federal claim based, as in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 678, 74 L. Ed. 1107, 1112, 50 S. Ct. 451, upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution. Compare Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320, 74 L. Ed. 870, 875, 50 S. Ct. 326."

In the case of *Great Northern Railway Company* v. *Sunburst Oil & Refining Company,* 287 U. S. 358, 367, 77 L. Ed. 360, the Court said:

> "The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (Consolidated Turnp. Co. v. Norfolk & O. V. R. Co., 228 U. S. 326, 334, 57 L. Ed. 857, 862, 33 S. Ct. 510; Cumberland Coal Co. v. Board of Revision, 284 U. S. 23, 76 L. Ed. 146, 52 S. Ct. 48), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 678, 74 L. Ed. 1107, 1112, 50 S. Ct. 451; Missouri ex rel, Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320,

74 L. Ed. 870, 875, 50 S. Ct. 326; American Surety Co. v. Baldwin, 287 U. S. ante, 125, 53 S. Ct. 98 supra."

A single appeal is sufficient to present both cases to the Supreme Court of the United States.

In the case of *First National Bank of Shreveport* v. *Louisiana Tax Commission,* decided March 20, 1933, 289 U. S. 60; 77 L. Ed. 1030; Advance Opinions, United States Supreme Court, Vol. 77, No. 10, p. 647, the Court said:

> "The argument for dismissal is that the cases had been consolidated below only for the purpose of trial; that since there was no true consolidation of the causes below, and a separate judgment was rendered in each, the separate causes cannot be brought for review to this Court by single appeal. Compare Brown v. Spofford, 95 U. S. 474, 484, 485, 24 L. Ed. 508, 510, 511. The record discloses that a complete consolidation of the causes was effected. Not only were the three cases consolidated for trial in the District Court; they were taken to the Supreme Court of the State on a single transcript, were there docketed and argued as one case, and were there disposed of by a single written opinion. The record shows also that a joint petition for a rehearing was filed and likewise disposed of by a single opinion. The motion to dismiss the appeal is denied. * * * "

Final Judgment.

In the case of *Rio Grande Western Railway Company* v. *Stringham, et al.,* 239 U. S. 44, 47, referring to a judgment final within the meaning of Judicial Code § 237, this Court said (p. 47):

> "It disposed of the whole case on the merits directed what judgment should be entered and left nothing to the judicial discretion of the trial court." (Citing a number of cases.)

In *Gulf Refining Co.* v. *United States of America*, 269 U. S., 125, this Court said (p. 135):

> "The general rule established by many decisions, of which Haseltine v. Central Nat. Bank, 183 U. S. 130, is an example, is that the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final. But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. Metropolitan Water Co. v. Kaw Valley Drainage Dist., 223 U. S. 519, 523 * * *. (136). There was no evidence to be taken or considered, and no change in the issue was possible; nothing remained but the ministerial duty of entering a decree for the precise sums which had been fixed beyond the power of alteration. **It follows that the jurisdictional objection is without merit.**" (Bold face ours.)

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code, as amended by the Act of February 13, 1925 (now Section 344-a of Title 28 of the United States Code) (28 U. S. C. A. Sec. 344-a), and as further amended or modified by the Acts of January 31, 1928, and April 26, 1928 (28 U. S. C. A. Sections 861-a and 861-b).

EDWARD C. TURNER,
ALBERT M. CALLAND.
Attorneys for The Columbus Gas and Fuel Company.

Columbus, Ohio, April 5th, 1934.